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D.T.E. 03-59

Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops.

ORDER CLOSING INVESTIGATION

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TABLE OF CONTENTS

I. INTRODUCTION

On August 21, 2003, the Federal Communications Commission ("FCC") released its Triennial Review Order,[1] in which the FCC revised its rules concerning incumbent local exchange carriers' ("incumbent LECs") obligation to make elements of their networks available on an unbundled basis to competing carriers under Section 251 of the Telecommunications Act of 1996.[2] Specifically, the FCC found on a national basis that denial of access to unbundled switching would not impair a competitive local exchange carrier's ("CLEC") ability to serve the enterprise markets, i.e., customers served with a DS1[3] capacity or above loop. Triennial Review Order at ¶¶ 451-53. The FCC recognized, however, that a geographically specific analysis could possibly demonstrate impairment in certain local markets. Id. at ¶ 454. Therefore, the FCC allowed state commissions 90 days from the effective date of the Triennial Review Order[4] to petition the FCC for a waiver of its national finding of no impairment. Id. at ¶ 455. The FCC required state commissions wishing to do so

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1 Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98; and Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Report and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36 (rel. Aug. 21, 2003) ("Triennial Review Order").

2 Communications Act of 1934, 47 U.S.C. §§ 151 et seq., amended by Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 86 (1996) (collectively, the "Act").

3 A DS1 loop is a digital loop providing a transmission speed of 1.544 megabits per second. Triennial Review Order at ¶ 202 n. 634.

4 The Triennial Review Order became effective on October 3, 2003.

to consider whether specific operational and economic criteria demonstrate that market entry is uneconomic in the absence of unbundled access to local circuit switching. Id. at ¶¶ 456-58. The FCC gave state commissions the discretion to define the relevant markets for this inquiry. Id. at ¶ 455.

On August 26, 2003, the Department of Telecommunications and Energy ("Department") opened this investigation to determine whether the Department should petition the FCC for a waiver of its no impairment finding. Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Large Business Customers Served by High-Capacity Loops, Vote and Order to Open Proceeding, D.T.E. 03-59. The Department required at least one CLEC operating in Massachusetts to file a "request to proceed" by September 5, 2003, before the Department would proceed with this investigation. Id. at 3. The Department received a timely request to proceed filed jointly by DSCI Corporation ("DSCI") and InfoHighway Communications Corporation ("InfoHighway").[5] The Department also permitted interested parties to file requests to participate in this investigation by September 16, 2003. The Department granted requests to participate in this investigation by Allegiance Telecom, Inc.; the Communications Workers of America, District One; the Department of Defense and all other Federal Executive Agencies; Lightship Telecom, LLC; Richmond Connections, Inc. d/b/a Richmond NetWorx;

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[5] American Long Lines, Inc. also submitted a request to proceed but failed to file through counsel; thus, this request was denied (Tr. at 6-7).

RNK, Inc. d/b/a RNK Telecom; Sprint Communications Company, L.P.; Verizon New England, Inc. d/b/a Verizon Massachusetts; WorldCom, Inc. ("MCI"); and Z-Tel Communications, Inc.[6] The Attorney General of the Commonwealth of Massachusetts filed a notice of intervention pursuant to G.L. c. 12, § 11E.

Pursuant to notice duly issued, the Department conducted a public hearing and procedural conference on September 25, 2003. At the procedural conference, the Department directed any participant seeking to challenge the FCC's determination of no impairment to file an offer of proof, setting forth facts to be shown that would support a finding of impairment, before the Department would proceed further with the investigation. The Department directed the participants (1) to identify the specific geographic markets to be considered in making the impairment determination; (2) to allege all facts demonstrating the existence or nonexistence of impairment in the proposed geographic markets, specifically addressing the FCC's operational and economic market factors; and (3) to address Verizon's contention that the extent of actual deployment of switches in Massachusetts by competitive providers demonstrates that carriers are not impaired without unbundled access to Verizon's switches (Tr. at 9-10; Procedural Memorandum at 1 (Sept. 26, 2003)).

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[6] The Department received a late-filed petition to intervene by PAETEC Communications, Inc. ("PAETEC"), but this petition fails to demonstrate good cause for the late filing. In addition, the claims that PAETEC offers to raise in this proceeding are essentially identical to those raised by DSCI and InfoHighway. Because we find below that these claims are not sufficient to support a waiver petition before the FCC, and because PAETEC has failed to demonstrate good cause for its untimely filing, we deny PAETEC's petition to intervene.

On October 15, 2003, DSCI and InfoHighway filed a Joint Offer of Proof on DS-1 Switching Impairment ("Offer of Proof").[7] No other party filed a timely offer of proof.[8] On October 17, 2003, Verizon filed a motion to file responsive comments. The Department granted this motion, and on October 27, 2003, Verizon filed its Response to the Offer of Proof

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7 DSCI and InfoHighway also filed a motion for confidential treatment demonstrating the need to protect competitively sensitive information included in their Offer of Proof pertaining to the number of lines that they have in service, the identities of specific end-user customers, the number of customers by industry segment, and account-specific revenue information, for a period of three years. We deem this request to be consistent with the requirements set forth in G.L. c. 25, § 5D; therefore, we grant the motion. See also Verizon Alternative Regulation, Interlocutory Order, D.T.E. 01-31-Phase I, at 9 (Aug. 29, 2001); Cambridge Electric Light Company, Interlocutory Order, D.P.U. 97-63, at 9 (Dec. 12, 1997).

8 The Department had directed the participants to file their statements of the case by October 9, 2003 (Tr. at 10; Procedural Memorandum at 2 (Sept. 26, 2003)). On October 8, 2003, the United States Court of Appeals for the Second Circuit granted a preliminary stay of the provisions pertaining to enterprise switching pending review of a motion to stay those provisions. InfoHighway Communications Corporation v. FCC, No. 03-40608 (2d Cir. Oct. 8, 2003)(order granting temporary stay pending hearing of motion for stay); Manhattan Telecommunications Corporation v. FCC, No. 03-40606 (2d Cir. Oct. 8, 2003)(same). On October 9, 2003, DSCI and InfoHighway filed copies of the court orders with the Department in lieu of filing pleadings. Because nothing in the Second Circuit's administrative stay order or in the underlying motions to stay involved a stay of the Department's investigation, the Department directed all participants that withheld their pleadings as a result of the stay orders to file their pleadings by October 15, 2003 (Procedural Memorandum at 1 (Oct. 14, 2003)). On November 3, 2003, the temporary stay orders were vacated and the underlying motions to stay were transferred to the United States Court of Appeals for the District of Columbia ("D.C. Circuit Court").

filed by DSCI and InfoHighway ("Verizon Response").[9] Other participants, such as the Attorney General, filed "comments" in response to the Department's orders to file offers of proof. These comments generally urge the Department to "consider each and every CLEC claim of impairment" so that the Department may fulfill its FCC-prescribed role as a fact-gatherer in this proceeding,[10] but because the comments do not themselves make additional claims of impairment, we do not consider them in evaluating the sufficiency of the case that DCSI and InfoHighway ask the Department to raise before the FCC.

II. TRIENNIAL REVEW ORDER

The Triennial Review Order revises the FCC's unbundling rules pursuant to 47 U.S.C. § 251, finding that a requesting carrier is impaired "when lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." Triennial Review Order at ¶ 84. The impairment analysis is based on determining "whether entry would be profitable without the [unbundled network element ("UNE")] in question." Id. at ¶ 85.

The FCC found CLECs are not impaired without unbundled access to local switching to serve enterprise customers, because there are few barriers to deploying competitive switches to serve customers in the enterprise market, and thus no operational or economic impairment on a

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9 On October 28, 2003, DSCI and InfoHighway filed a request for leave to file a reply to Verizon's Response on the grounds that Verizon made new and unanticipated factual and legal allegations. We deny this request because we find nothing in Verizon's Response that should have been unanticipated or that presents new arguments.

10 See, e.g., Attorney General Comments at 2 (Oct. 9, 2003).

national basis. Id. at ¶ 451. The FCC's new unbundling rules provide that "[a]n incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS1 capacity and above loops except where the state commission petitions [the FCC] for waiver of this finding in accordance with the conditions set forth in [47 C.F.R. § 51.319(d)(3)(i)]." 47 C.F.R. § 51.319(d)(3).

The FCC permitted state commissions to seek waivers of the national finding, because it recognized that a geographically specific analysis could possibly demonstrate impairment in a local market. Triennial Review Order at ¶ 454. The rules require state commissions wishing to rebut the FCC's national finding of no impairment to show that requesting telecommunications carriers are impaired in serving the enterprise markets without access to unbundled local circuit switching in granular geographic markets that a state commission is to define by taking into consideration "the locations of . . . customers actually being served (if any) by competitors, variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and service specific markets profitably and efficiently using currently available technologies." 47 C.F.R. §§ 51.319(d)(2)(i), 51.319(d)(3)(i); see also Triennial Review Order at ¶¶ 455 and Part VI.D.6.a.(ii)(b)(i). The FCC has precluded state commissions from defining the relevant geographic market as the entire state. 47 C.F.R. § 51.319(d)(2)(i).

After defining the relevant geographic markets, state commissions must evaluate specific operational and economic characteristics of those markets and determine that operational and economic barriers exist in those markets. 47 C.F.R. § 51.319(d)(3)(i). These operational market characteristics include:

> incumbent LEC performance in provisioning loops; difficulties associated with obtaining collocation space due to lack of space or delays in provisioning by the incumbent LEC; and the difficulties associated with obtaining cross-connects in the incumbent LEC's wire center.

47 C.F.R. 51.319(d)(3)(i)(A); Triennial Review Order at ¶ 456. The economic market characteristics that state commissions must evaluate are:

> the cost of entry into a particular market, including those caused by both operational and economic barriers to entry; requesting telecommunications carriers' potential revenues from serving enterprise customers in that market, including all likely revenues to be gained from entering that market; the prices requesting telecommunications carriers are likely to be able to charge in that market, based on a consideration of the prevailing retail rates the incumbent LEC charges to the different classes of customers in the different parts of the state.

47 C.F.R. § 51.319(d)(3)(i)(B); Triennial Review Order at ¶ 457.

III. DSCI AND INFOHIGHWAY OFFER OF PROOF

The facts that DSCI and InfoHighway offer to prove in support of an impairment finding are as follows:

DSCI and InfoHighway are CLECs serving small-to-medium-sized business customers in all density zones (Offer of Proof at 7). Both carriers originally served business customers on a resale basis (id.). Beginning in 2001, DSCI and InfoHighway began placing orders for UNE-P[11] DS1 service from Verizon (id.). A substantial segment of DSCI's and InfoHighway's

11 UNE-P (i.e., UNE-platform) is a complete set of unbundled network elements used by CLECs to provide an end-to-end circuit.

business now relies upon revenues derived from UNE-P DS1 lines provisioned by Verizon at TELRIC[12] rates (id. at 7-9). Both carriers will lose substantial revenues if UNE-P DS1 service is not available (id. at 8-9).

DSCI complains that in provisioning UNE-P DS1 lines, Verizon has disrupted service to a significant portion of its customers for extended periods (id. at 9). As a result of operational problems in provisioning UNE-P DS1 lines, Verizon currently provisions new DS1 orders from DSCI and InfoHighway via a surrogate platform at UNE-P DS1 rates (id. at 9-10). DSCI also complains of Verizon's repair and maintenance of UNE-P DS1 lines, claiming that 44% of its DS1 lines had repair tickets and trouble reports ranging in length between 1.5 hours to twelve days, during which time customers experienced service outages (id. at 10).

It is undisputed that Verizon has no "hot cut" process in place to migrate lines from UNE-P or surrogate platforms to CLEC-provided unbundled switching (id. at 11; Verizon Response at 4). DSCI and InfoHighway state that Verizon has not informed them of any steps taken to develop a DS1 migration process or to initiate a DS1 migration trial (Offer of Proof at 12). DSCI and InfoHighway claim that they cannot feasibly respond to a finding of no impairment by migrating DS1 customers to UNE-P DS0[13] service, because DS1 customers typically use customer premises equipment not configured for use with DS0 lines without

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12 TELRIC (i.e., Total Element Long Run Incremental Cost) is a method of determining the cost of network elements based on incremental costs of equipment and labor, not counting embedded costs.

13 A DS0 loop has a transmission speed of 64 kilobits per second, the bandwidth necessary to transmit the digital equivalent of an analog voice line. Triennial Review Order at ¶ 202 n.634.

expensive hardware changes, and because pricing changes would render DS0 service uneconomic to the carriers' current DS1 customers (id.). DSCI and InfoHighway claim that the process of migrating a customer from a Verizon switch to a CLEC switch is much more labor intensive and time consuming than the process for taking a DSCI or InfoHighway UNE-P enterprise customer back to Verizon retail service, which requires only a simple billing records change (id.).

IV. POSITIONS OF THE PARTICIPANTS

A. DSCI and InfoHighway

DSCI and InfoHighway argue that "[u]ntil Verizon establishes a reliable process to cut over CLEC customers from Verizon's UNE-P or surrogate platforms in a seamless manner to alternative arrangements that employ non-ILEC switching, . . . [c]arriers are operationally impaired, at minimum with respect to their existing customer bases" (Offer of Proof at 13). DSCI and InfoHighway argue that this impairment exists regardless of the number of CLEC-provisioned switches that exist in Massachusetts (id.). DSCI and InfoHighway contend that migrations to alternative switching facilities without any Verizon process in place will be a "nightmare," because hundreds of businesses could be cut off from service for extended periods, causing substantial harm to the public (id. at 14).

DSCI and InfoHighway urge the Department to petition the FCC for a waiver that would allow carriers "to investigate and substantiate the specific geographic areas that remain impaired under the FCC's standards after the conclusion of the nine-month mass markets investigation in [D.T.E. 03-60]" (id. at 17-18).[14] DSCI and InfoHighway contend that because the geographic market and product market definitions that are to be investigated in the mass markets proceeding have not been determined, the FCC has, in effect, required carriers to provide data for specific granular enterprise markets at least six months before the relevant market definitions are to be established (id. at 17). DSCI and InfoHighway contend that it is "impossible" for CLECs "to provide 'all relevant evidence' on economic and operational impairments for enterprise markets on a geographic area basis, when those [market definitions] will not be finalized for many months" (id.).

DSCI and InfoHighway argue that under Section 271 of the Act, Verizon has an obligation to provide competitors with local circuit switching at rates, terms, and conditions that are "just and reasonable" (id. at 18, citing 47 U.S.C. §§ 201(b), 202(a), 271). DSCI and InfoHighway argue that this obligation is independent of any unbundling obligation required under 47 U.S.C. § 251 (id. at 18). Therefore, DSCI and InfoHighway argue that the Department should require the current TELRIC rates for unbundled local switching to remain in effect until the Department has determined that the rate that Verizon seeks to charge for local switching is "just and reasonable" according to 47 U.S.C. §§ 201 and 202 (id. at 19). DSCI and InfoHighway assert that wholesale market prices in Massachusetts are close to

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14 In Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers, D.T.E. 03-60, the Department is investigating, among other things, whether requesting carriers are impaired without unbundled access to local circuit switching serving end users using DS0 capacity loops.

TELRIC rates currently in effect (id.). DSCI and InfoHighway further add that change of law provisions in the interconnection agreements of several CLECs provide that unresolved disputes over pricing changes should be decided by the Department (id.).

B. Verizon

First, Verizon argues that DSCI and InfoHighway offer no factual showing regarding the FCC's "mandatory operational criteria" (Verizon Response at 3, citing Triennial Review Order at ¶ 456; 47 C.F.R. § 51.319(d)(3)(i)). Verizon states that DSCI and InfoHighway raise no issue with Verizon's performance in provisioning stand-alone loops in Massachusetts (Verizon Response at 3). Further, Verizon notes that DSCI and InfoHighway do not allege difficulties in obtaining collocation due to lack of space or delays in provisioning, nor allege any difficulties in obtaining cross-connects in any Verizon wire center (id.). Verizon argues that DSCI's and InfoHighway's complaint about the provisioning of UNE-P arrangements for high capacity loops has "no bearing on the question of whether carriers are impaired in deploying their own switches to serve enterprise customers" (id). Rather, Verizon argues, the relevant provisioning issue concerns Verizon's provisioning of stand-alone loops, i.e. UNE-L, not UNE-P arrangements (id.).

Verizon argues that the fact that there is no "hot cut" process for migrating a DS1 enterprise customer from Verizon's network to a CLEC's network does not demonstrate operational impairment (id. at 4). Verizon states that the FCC pointed out that "the conversion process for enterprise customers generally involves the initiation of service to the competitor's new digital loop while the incumbent's service remains in place" (id. at 4-5, quoting Triennial

Review Order at ¶ 451). Verizon therefore argues that a hot cut process is unnecessary, and that the process of establishing a parallel digital loop eliminates what the FCC considers to be "a significant source of impairment" (id. at 5, quoting Triennial Review Order at ¶ 451). Verizon maintains that to the extent that DSCI and InfoHighway are concerned with transitioning the embedded base of UNE-P arrangements over to a UNE loop environment, the transition should be implemented under the negotiation provisions of 47 U.S.C. § 252 and their existing interconnection agreements (id., citing Triennial Review Order at ¶¶ 700-706).

Next, Verizon argues that DSCI and InfoHighway offer no factual showing regarding the FCC's "mandatory economic criteria" (id., citing Triennial Review Order at ¶ 457). Verizon states that DSCI and InfoHighway provide no evidence of the likely revenues to be gained from entering the enterprise market or the prices that entrants are likely to be able to charge (Verizon Response at 5-6). Verizon maintains that the only economic impairment argument that DSCI and InfoHighway present is that while they "originally served Massachusetts business customers on a resale basis," and now offer the same service using UNE-P, they claim that they will be impaired if they lose what Verizon characterizes as a "pricing windfall" from UNE-P (id. at 6, quoting Offer of Proof at 7). Further, Verizon argues that DSCI and InfoHighway improperly equate "impairment" with the extent of their own profitability, that the cost of a switch is the cost that any new entrant would bear and cannot serve as a basis for impairment, that the FCC "cannot order unbundling merely because certain competitors or entrants with certain business plans are impaired," and that a finding of no impairment for enterprise switching will not prevent them from continuing to serve customers using Verizon's network, because they can still do so on a resale basis (Verizon Response at 6, citing Triennial Review Order at ¶¶ 115, 454 n.1392). Finally, Verizon argues that the term "impairment" with respect to enterprise switching refers to "the inability of a CLEC to enter the local enterprise market without access to the ILEC's switching, not whether a CLEC can enter the market by using the ILEC's switching" (Verizon Response at 7 (emphasis in original)). Verizon suggests that the fact the DSCI and InfoHighway offer no evidence regarding their costs associated with market entry suggests that they "have the opportunity to earn revenues that outweigh the costs associated with entry" and are therefore not impaired (id., quoting Triennial Review Order at ¶ 458).

Verizon also argues that DSCI and InfoHighway fail to define the relevant markets for which they claim impairment, but rather only contend vaguely that there are "substantial geographic areas of the Commonwealth" that satisfy the "economic and operational impairment standards established by" the Triennial Review Order (Verizon Response at 7-8, quoting Offer of Proof at 16). Verizon states that DSCI and InfoHighway provide no details regarding where these "substantial geographic areas" might be found, but rather state only that they "strongly believe, and contend" that this is true (Verizon Response at 8).

Verizon argues that the 90-day deadline cannot be waived (id.). Verizon states that the only waiver available to the Department is a waiver of the FCC's national finding of no impairment, and that the finding is self-executing unless a waiver petition has been filed (id. at 9, citing Triennial Review Order at ¶ 455). Verizon suggests that there is no need to seek a waiver of the 90-day deadline, because even if the initial 90-day period expires, state commissions may revisit whether competitive LECs are impaired due to changes in the specified operational and economic criteria (id.).

Finally, Verizon argues that the Department cannot suspend Verizon's ability to charge "just and reasonable" rates if CLECs are not impaired without access to enterprise switching (id. at 10). Verizon states that DSCI and InfoHighway do not dispute that, if CLECs are not impaired, then the only basis for continued unbundling of this network element is Verizon's separate Section 271 obligation, and that the "just and reasonable" standard is set forth in Sections 201 and 202 of the Act (id.). Verizon further states that TELRIC pricing applies only to network elements unbundled pursuant to Section 251, where impairment is found to exist, and that the FCC has noted that a rate would be "just and reasonable" if shown to be based on the results of arms-length agreements (id. at 10-11, citing Triennial Review Order at ¶ 664). Moreover, Verizon argues that the Department would not have jurisdiction to review the reasonableness of rates for Section 271 elements, because 47 U.S.C. § 271(d)(6) grants enforcement authority to the FCC to ensure that Verizon continues to comply with the market opening requirements of Section 271, not to the Department (id. at 11, citing Triennial Review Order at ¶ 665).

V. ANALYSIS AND FINDINGS

A. Market Definitions

The starting point of any market entry analysis is to define the relevant product and geographic markets, and the FCC provided specific factors to be considered in defining those markets. 47 C.F.R. §§ 51.319(d)(2)(i), 51.319(d)(3)(i). Although we directed DSCI and

InfoHighway to identify those markets, they state only that "substantial geographic areas" would meet the economic and operational impairment standards of the Triennial Review Order (Offer of Proof at 16). DSCI and InfoHighway do not address customer location, variation in factors that would affect competitors' ability to serve such customers, or competitors' ability to target customers in these "substantial geographic areas." Thus, they offer no facts that would enable the Department to determine whether those unidentified "areas" actually constitute "markets." 47 C.F.R. § 51.319(d)(2)(i). Therefore, even if they were able to demonstrate all of the facts that they set forth in their offer of proof, there would be no basis for filing a waiver petition with the FCC, because we would be unable to define the granular markets in which requesting carriers purportedly would be impaired without unbundled access to local switching for enterprise customers.

To justify this failure to identify relevant markets, DSCI and InfoHighway argue that it is "impossible" to complete this enterprise market analysis, because, as they assert, enterprise market determinations will not be available until the nine-month mass market proceeding is complete (Offer of Proof at 17). We reject DSCI's and InfoHighway's argument that the Triennial Review Order must leave the market definitions for enterprise customers indefinite, however, because such a reading would lead to the nonsensical result that the impairment analysis for the enterprise markets cannot be completed for nine months, where clearly the FCC intended it to be completed in 90 days.[15]

B. Operational and Economic Impairment

Even if granular markets were defined, we would not find any reason to petition the FCC for a waiver based on the Offer of Proof, because DSCI and InfoHighway do not address the FCC's mandatory operational impairment criteria: Verizon's performance in provisioning stand-alone DS1 loops; difficulties associated with obtaining Verizon collocation space; and the difficulties associated with obtaining cross-connects in Verizon's wire centers. See 47 C.F.R. § 51.319(d)(3)(i)(A). DSCI and InfoHighway also do not address the FCC's mandatory economic impairment criteria: the cost of entry[16] and potential revenues taking into account the prices that they are likely to be able to charge and Verizon's prevailing retail rate to different customer classes in different geographic markets. 47 C.F.R. § 51.319(d)(3)(i)(B).

Rather, DSCI and InfoHighway rest their impairment claim on the fact that Verizon does not have, and is not developing, a seamless hot cut procedure to migrate an enterprise UNE-P DS1 customer from Verizon's network to a CLEC network. They ignore the FCC's

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[15] To the extent that there are inconsistencies in the Triennial Review Order, the Department is not the proper forum in which to litigate whether the Triennial Review Order itself is sound.

[16] We note that DSCI and InfoHighway assert that the cost of migrating a UNE-P customer to a DS1 circuit with a CLEC-provided or a self-provisioned switch would cost them as much as $2,000, if they must do so without "seamless, cost-free" hot cuts (Reply at 6). This assertion of the cost of entry on its own is meaningless without a comparison of potential revenues. Mere proof of increased entry cost is not sufficient to demonstrate impairment. See Triennial Review Order at ¶ 85.

finding that where enterprise customers are being converted from incumbent LECs' digital facilities, a competitor may avoid impairment from service disruption and quality degradation to enterprise customers due to physical hot cuts by establishing a parallel digital loop and by disconnecting the incumbent's service only after the competitor's service over the new loop is initiated. Triennial Review Order at ¶ 451. Therefore, the lack of a seamless hot cut procedure for migrating enterprise customers cannot be evidence of impairment, where a competitor may migrate the customer by establishing a parallel digital loop. DSCI and InfoHighway offer no proof to the contrary. The only showing that DSCI and InfoHighway offer regarding loop provisioning is that Verizon's record of provisioning, repair, and maintenance of UNE-P DS1 loops has caused significant service disruptions (Offer of Proof at 9-10). This assertion does not demonstrate that CLECs would be impaired without UNE-P, because the relevant inquiry is Verizon's performance in provisioning stand-alone DS1 loops, not UNE-P loops.

C. Waiver of the 90-Day Deadline

DSCI and InfoHighway cite to no provision of the Triennial Review Order providing for filing a petition with the FCC for a waiver of the 90-day deadline to complete this proceeding. While any rule of the FCC can be waived by petition for "good cause" pursuant to 47 C.F.R. § 1.3, we find no good cause for the Department to seek a waiver of the 90-day deadline, because we reject the argument that enterprise market definitions cannot be applied in this proceeding until after they are determined in the mass markets proceeding. We note, however, that motions to stay are pending before the D.C. Circuit Court, and the disposition of those motions may affect our interpretation of the Triennial Review Order regarding the carriers' obligation to demonstrate the applicable market definitions. If the D.C. Circuit Court grants the motions to stay and holds that the enterprise market definitions cannot be applied until the DS0 cutoff point is determined in the states' mass markets proceedings, any participant may move to reopen this proceeding accordingly.

Further, we agree with Verizon's argument that the FCC's determination of no impairment for enterprise switching can be challenged after the 90-day period to revisit whether CLECs are impaired due to changes in the specified operational and economic criteria. Triennial Review Order at ¶ 455; 47 C.F.R. § 59.319(d)(5). The Department is not required to have conducted an initial impairment analysis in order to petition the FCC for a subsequent waiver of the findings of no impairment based on changes in the operational and economic criteria. If the Department takes no action, the FCC's national findings are the default findings in Massachusetts and are self-executing.

D. Verizon's Rates for Section 271 Elements

Freezing Verizon's rates for enterprise switching and UNE-P elements at their current TELRIC rates in the event that the Department does not petition the FCC for a waiver of its finding of no impairment for local switching for serving enterprise customers is beyond the scope of this proceeding and is unwarranted under Section 271. DSCI, InfoHighway, and Verizon agree that even if Verizon is not required to unbundle the local switching element for the enterprise market under Section 251, Verizon has an independent unbundling obligation under Section 271 (Offer of Proof at 18; Verizon Response at 10). Further, they agree that the pricing standard for elements required to be unbundled under Section 271 is the "just and reasonable" standard set forth in Sections 201 and 201 of the Act, and that market-driven rates would be considered in determining a just and reasonable rate (Offer of Proof at 18-19; Verizon Response at 10-11). The Department, however, does not have jurisdiction to enforce Verizon's unbundling obligations pursuant to Section 271. See 47 U.S.C. § 271(d)(6). The proper forum for enforcing Verizon's Section 271 unbundling obligations is before the FCC. Id.

Freezing Verizon's local switching rates at TELRIC for the enterprise market pending review of whether the rates are "just and reasonable" would also be unwarranted under the Department's own authority to regulate intrastate common carrier services, G.L. c. 159, §§ 12, 17, 19, where the proper pricing is to be market-driven. The Department has held that market prices that are subject to the "disciplining effects of competitive forces" are presumptively "just and reasonable." See, e.g., Verizon Alternative Regulation, D.T.E. 01-31 Phase I, at 19 (2002) (discussing retail rates). A national finding of no impairment for local switching is a finding that there are no operational or economic barriers to deploying competitive switches and that the revenue opportunities associated with serving DS1 enterprise customers are sufficient to justify the sunk and fixed costs of entry. Triennial Review Order at ¶¶ 451-52. Given this potential threat of market entry by competitors, Verizon's pricing would be subject to competitive forces. See D.T.E. 01-31 Phase I, at 60-61.

Finally, to the extent that the carriers must renegotiate terms of their interconnection agreements in response to the change in law, the Triennial Review Order sets forth a transition framework for modifying those agreements. Triennial Review Order at ¶¶ 700-706; 47 U.S.C. § 252. This framework contemplates that the carriers would "begin immediately to negotiate in good faith," prior to submitting unresolved issues to states for arbitration according to the timetable in 47 U.S.C. § 252. Thus, review of those interconnection agreements is premature at this time.[17]

VI. CONCLUSION

Even if the facts that DSCI and InfoHighway offer to prove in this investigation are true, they provide no basis for the Department to file a petition with the FCC for a waiver of its Triennial Review Order finding of no impairment for local switching in the enterprise markets. We find no reason to continue this investigation, because we do not believe that the Department would be successful on the merits of an impairment petition to the FCC based on the facts alleged.

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[17] Although we will not review these agreements at this time, carriers may continue to request informal assistance from the Department's Telecommunications Division to resolve operational problems experienced in transitioning their facilities, where those problems threaten to disrupt or degrade service to customers as DSCI and InfoHighway have described in their Offer of Proof.

VII. ORDER

After due notice and consideration, it is

ORDERED that the investigation by the Department of Telecommunications and Energy on its own motion to implement the requirements of the Federal Communications Commission's Triennial Review Order regarding switching for large business customers served by high-capacity loops is CLOSED.

By Order of the Department

/s

Paul G. Afonso, Chairman

/s

James Connelly, Commissioner

/s

W. Robert Keating, Commissioner

/s

Eugene J. Sullivan, Jr., Commissioner

/s

Deirdre K. Manning, Commissioner